IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 592

COCHEYSE J. GRIFFIN, etc., *et al.*,
Petitioners,
v.
COUNTY SCHOOL BOARD OF
PRINCE EDWARD COUNTY, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* SUBMITTED BY THE CITY OF CHARLOTTESVILLE IN SUPPORT OF THE CONSTITUTIONALITY OF THE VIRGINIA STATE SCHOLARSHIP PROGRAM

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Statement

The City of Charlottesville, sponsored by its authorized law officer, Paul D. Summers, Jr., City Attorney, files this brief pursuant to Rule 42(4) of the Rules of this Court solely in support of the constitutionality of the Virginia State Tuition Grant Law as enacted and as applied generally.

The City takes no position on the validity of any application of that law in Prince Edward County, or its supplementation by local ordinance—or even as to whether there properly are such issues now before this Court.

The Virginia State Scholarship Program

History of Tuition Grant Legislation

For thirty-four years past, Virginia has maintained some type of tuition grant program which has made available an educational option either to attend state-supported public schools or to receive financial aid for any approved instruction in other districts or in private schools.* As the Court of Appeals correctly noted (R. 220; 322 F. 2d 332, 339), "Virginia's program of tuition grants to pupils * * * has a lengthy history." As there described (*ibid.*, fn. 18):

> "Virginia's tuition grant program had its first beginning many years ago in aid of children who had lost their fathers in World War I. It was expanded to include others until 1955 when the Supreme Court of Appeals of Virginia held that the tuition grants were in violation of Virginia's Constitution when given to pupils attending private schools."

The Supreme Court of Appeals of Virginia, in *Almond* v. *Day*, 197 Va. 419, 89 S.E. 2d 851 (1955), held the Virginia Constitution to have been violated to the extent that State monies were used to pay the fees of children attending private schools, and held that both the State and Federal Constitutions forbade such grants being used to meet tuition payments in sectarian schools. To re-

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* Acts 1930, c. 375, p. 810; Acts 1932, c. 147, p. 193; Biennial Appropriation Acts 1934 through 1948 (Acts 1934, c. 358, p. 593; Acts 1936, c. 422, p. 845; Acts 1938, c. 428, p. 893; Acts 1940, c. 425, p. 790; Acts 1942, c. 475, p. 803, Item 103; Acts 1944, c. 407, p. 688, Item 114; Acts 1946, c. 388, p. 817, Item 122; Acts 1948, c. 552, p. 1173, Item 129; Acts 1950, c. 578, p. 1377, Item 129; Acts 1952, c. 716, p. 1223, Item 203; Acts 1954, c. 708, p. 970, Item 210; Acts 1952, c. 83, p. 100.

establish the tuition grant program, the voters of the Commonwealth quickly approved an amendment to Section 141 of the Virginia Constitution to provide:

"* * * that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; * * *"

In 1956, an extra session of the Virginia Legislature incorporated the tuition grant statutes into the "massive resistance" legislative program by keying them to localities where integration had been ordered in the public schools. Acts 1956, Ex. Sess., c. 68, p. 69, and c. 69, p. 72 (Code of Virginia, 1950, as amended (1958 Cum. Supp.), §§22-188.3 *et seq.*, and 22-188.30 *et seq.*). No federal court review was needed. On its first test, the Supreme Court of Appeals of Virginia held the 1956 law to be clearly unconstitutional in *Harrison* v. *Day*, 200 Va. 439, 106 S.E. 2d 636 (1959). The 1959 extra session then repealed the 1956 provisions.

By 1959, massive resistance had run its course in Virginia. The Perrow Commission on Education reported to Governor Almond on March 31 of that year that Virginia should abandon any further legal opposition to integration.

"The truth is that neither the General Assembly nor the Governor has the power to overrule or

nullify the final decrees of the federal courts in the school cases.

"There is sentiment that it would be better to have no public schools than to have any mixed schools anywhere in Virginia. However, we believe that at this time a majority of the people of Virginia is unwilling to have the public schools abandoned.

"Accordingly, we propose measures to bring about the greatest possible *freedom of choice* for each locality and each individual.

"We recommend that scholarships be made available to children in every locality to attend nonsectarian private schools.

* * * * *

"These proposals permit the preservation of public free schools and implement flexible local autonomy. They are founded on the twin principles of local determination and *freedom of choice*." (p. 6)

The nature of the policy reversal recommended by the majority was made even clearer by the dissenting members:

"The question is, are the people of Virginia ready to make the necessary amendments to the Constitution and continue a program of massive resistance? So far as we are concerned, we are ready.

* * * * *

"The majority report acknowledges the superior power of the federal courts and that no locality will be able to place the State and her sovereign power between it and the federal court. Every locality will be without any legal weapon to prevent court-ordered integration." (p. 24)

The Perrow Report was accepted by Governor Almond and he recommended the proposed bills to the Virginia Legislature:

Address of J. Lindsay Almond, Jr., Governor
(Excerpts)

"Scholarships—Aid to Education

"In my judgment the [Perrow] Commission has greatly improved and reinforced the status of grants in aid of education. It has endeavored and, I believe, succeeded in evolving sound tuition grant procedure. The scope has been broadened to provide scholarships to all children entitled to attend the public free schools who prefer to attend private rather than public schools. The State and localities would participate jointly. The locality's share would be the same percentage as its contribution to the cost of operating public schools.

"The Commission gave attention to the matter of tuition charges relating to a child attending school in another locality. It is recommended that such tuition be limited to the total per capita cost of education, excluding debt service and capital outlay, of the public schools of the locality to which the child is admitted."

The Governor's philosophy was accepted, "massive resistance" was dropped, and, by means of the statutes adopted at the extra session of 1959, Virginia embarked upon a broader educational freedom of choice which thereafter included all children without distinction on the basis of the color, race or creed of the pupil or of his choice of any non-religious public or private school.

The Operation of the Tuition Grant Program

1. The Statute and Regulations

The Tuition Grant Program is contained in Sections 22-115.29 through 22-115.37 of the Code of Virginia (Acts 1960, c. 448 and c. 461), which are set out in full as Appendix A to this brief. The procedures under those statutes are set by "Regulations of the State Board of Education Governing Pupil Scholarships," issued June 28, 1963, which are attached as Appendix B. An application form and instructions are included as Appendix C.

As the Code and Regulations indicate, State scholarship aid is available to any child in the State who prefers to receive his educational entitlement for use at any qualified school other than the public school in his own district. There is no limitation to the schools of Virginia or, so far as the statutory language is concerned, even to schools in the United States. The pupil has an almost unlimited choice of private or public, special purpose, vocational, or remedial schools, the only limitation being that the school shall be a qualified educational institution having a course of instruction approved by the Superintendent of Public Instruction—a requirement which dates back to 1932.* To avoid any possibility that such approval might be given or withheld on racial grounds, the State Board of Education, in prescribing the minimum academic standards for a school, is forbidden to

> "* * * deal in any way with the requirements of such school concerning the eligibility of pupils who may be admitted thereto." (Code of Virginia, 1950, as amended (1962 Cum. Supp.), § 22-115.33).

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* Acts 1932, c. 147, p. 193, provided for the payment of matriculation fees, board and room rent, books and supplies "at any educational institution in the State of Virginia approved in writing by the superintendent of public instruction."

Under the program local school boards are permitted, but not required, to supplement the State aid. If a local board fails to do so, the State Board of Education will direct the Superintendent of Public Instruction to provide an equivalent on behalf of the local government, an amount which will thereafter be deducted from the locality's distribution of State funds which have been appropriated for purposes *other* than education or welfare (Code of Virginia, 1950, as amended (1962 Cum. Supp.), § 22-115.34). Petitioners' suggestions to the contrary notwithstanding, public school appropriations may not be used for scholarship aid, and accordingly the program does not decrease educational funds at either the State or local level.

The combined aid from State and locality in no case exceeds the per pupil cost of maintaining the applicant in the public schools of his community. State assistance is limited to a maximum of $250 to elementary school children, $275 for high school children, less when the locality also contributes. In no event does the combined aid exceed actual tuition charges paid by the child's parents at the school of their choice.

As an example of the wide variation which this covers, the cost of public education in 1962-63 ranged from $190.23 in Buchanan County to $555.04 in Arlington County. However, there can be no net cost of the tuition grant program to the State or to the locality, since the grants made are always equal to or less than the local public school operating cost per pupil. By way of example, the present average tuition grant in Richmond is $259.18 as compared with a public school cost of $362.11. Charlottesville, on the other hand has paid grants in amounts equal to the operating cost of $306 per pupil in the City's public schools (1963-4).

2. Operation Under the Statute

The Court of Appeals noted (*Griffin*, *supra*, p. 340), that thirty-one school districts of Virginia are now desegregated. Yet, only about 1% of the eligible children of the State have applied for scholarship assistance and the amounts expended for it have been less than 1% of the State's public school budget.

For the last three years in which this legislation has been in effect, the actual figures on applications are as follows:

Year	Children Receiving Public Aid		Combined State and Local Operating Expenditures for Education[1]		
	In Public Schools	By Tuition Grants	For Public Schools	For Tuition Grants	Per Cent for Tuition Grants
1960-61	787,195	8,127	204,965,512	1,755,543	0.856
1961-62	811,984	8,518	227,897,829	2,074,690	0.910
1962-63	840,000	9,489	253,155,192	2,252,995	0.889

[1] Not including capital outlays, interest, or State administrative expenses.

* * * * *

An analysis of the 9,489 applications approved last year shows 5,873 were elementary pupils, 3,656 high school pupils; 5,507 were boys, 3,982 girls; 9,147 were white, 331 Negro and 11 other.* Of the grantees, 8,429 attended some 429 private schools within the United States and 1,060 attended public schools outside their own district. Eight thousand nine hundred four applications were processed locally, 585 were handled by the State's Department

* Mostly illegible. But since the indication of race has only statistical significance, illegibility on this item of the application form did not disqualify the applicant.

of Education and paid directly to the applicants. Of the total scholarships of $2,252,995, the State paid slightly more than half, $1,190,418 against $1,062,577 paid from local funds.

The listing of schools attended by Virginia children receiving tuition aid is too long to include in this brief. The following list covers only the City of Charlottesville and Albemarle County.

Albemarle High
Augusta Military Academy
Belfield
Brookside
Burnley Moran Elementary
Clark Elementary
Clarke School for Deaf
Cunningham District
Darrow
Dyke Elementary
Elmer Myers
Fishburne Military Academy
Fluvanna County High
Fountain Valley School of Colorado
Greenbrier Elementary
Grier
The Gunnery
Highland Springs High
The Hill School
Howard School for Girls
Indian Mountain
Johnson Elementary
Lane High
Lawrenceville
McGuffey Elementary
McIntire
Merridale
Miller
Milton Academy
Mount Berry School for Boys
Oldfields
Phillips Exeter Academy
Proctor Academy
Robert E. Lee
Rock Hill Academy
Rose Hill Elementary
Shipley
St. Paul's
Solebury
Staunton Military Academy
Stoutamyre School of Special Education
Taft
Venable Elementary
Washington School of Ballet
William Monroe High
Woodberry Forest

As the Court will see, the schools attended are as various as the applicants—military schools, prep schools,* boys' schools, girls' schools, special purpose schools, vocational schools, Virginia schools and schools in a dozen other states. Nothing could better illustrate the breadth of the choice in education which the tuition grant program makes possible than the many uses to which this program can be put in one relatively small city and county.

The Interest of the City of Charlottesville as *Amicus Curiae* in Sustaining the Validity of the Virginia State Scholarship Laws

The City has both a financial and educational interest in the continuation of the scholarship program. The financial interest arises from the difference to the City between the outlays for program recipients and public school pupils. In the quotation given above (p. 5), Governor Almond pointed to this difference in referring to maximum payments of the "per capita cost of education, *excluding debt service and capital outlay.*"

On new construction and school equipment today, capital outlay approximates $2,500 per pupil. If the 761 children in Charlottesville who now receive tuition grants were to transfer to public schools, the City could be required to invest close to $2,000,000 for their accommodation. Annual debt service on such a sum would be nearly

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* Of particular interest are the large number of high-cost in and out-of-state college preparatory schools. These serve to illustrate the scholarship nature of the tuition grant program. Many lower income families who would be unable to meet higher school costs unaided enter their children through the assistance afforded by the State's program. This is particularly helpful in a city like Charlottesville with a large number of University staff members oriented toward specialized education.

$60,000, without amortization. Since public school operating costs for this number of pupils would be substantially equal to the amount now being paid as tuition grants, $115,231, the City would be out of pocket its capital investment and interest charges without any compensating educational benefit to its citizens.

But of considerably greater importance to the City than the saving is the civic obligation to obtain the best possible education for its children. The City and school authorities of Charlottesville believe that those who would not be most effectively taught in the public schools should be given every opportunity to select the training which will prove most suitable to them as individuals.

In the opinion of the City the State's scholarship program is a major step toward this objective. In our view this legislation constitutes a necessary accommodation of the mass public educational process to the special needs of the minority or non-average individual. Every child in Charlottesville, no matter his color or his means, has an absolute freedom of choice to attend a City school or to obtain, as an option, a scholarship for use in any other qualified public or private school in the continental United States. Whether or not such a program is capable of misuse in a specific situation, the families of this City and of the other communities of Virginia should not be deprived of its fundamental educational advantages.

Summary of Argument

I

The Constitutional Validity of Granting State Scholarship Aid Is Not at Issue in this Case

II

There Is No Constitutionally Significant Relation Between the State and the Schools Selected by Grant Recipients

III

Scholarship Assistance Made Available to All Children on Equal Terms Without Regard to Race, Creed or Color Is Valid as an Expression of the State's Educational Obligation Consistent with First Amendment Freedoms

IV

The Petitioners Make No Case for a General Review of the Scholarship Aid Program in Virginia

V

The Special Objections of the Church Schools Have No Basis in the Rulings of this Court

ARGUMENT

I

The Constitutional Validity of Granting State Scholarship Aid Is Not at Issue in this Case

It is the position of the City of Charlottesville that under the established principles of judicial restraint, a review of the Virginia Scholarship program is not called for by the Court on this record. If the Court agrees with us on this point, none of the other points hereinafter made need be considered.

There Is No Basis in the Law for Broad Anticipatory Constitutional Declarations

This Court has many times held that the constitutionality of state statutes will not be considered except where that issue is squarely presented on the record and a decision is essential to resolve an actual controversy between the parties before the Court.

The general principle and leading cases are collected and summarized in 11 Am. Jur., *Constitutional Law*, § 93:

> "[The Supreme Court of the United States] has announced that it rigidly adheres to the rule never to anticipate a question of constitutional law in advance of the necessity of deciding it, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, and never to consider the constitutionality of state legislation unless it is imperatively required."

First, the precise facts of the case involved must pose the question for decision. "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case", *Burton* v. *United States*, 196 U. S. 283, 295 (1905). Or, as said in *Liverpool, N. Y. and Phila. S.S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885):

> "[This court] has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies * * * [and will] never * * * anticipate a question of constitutional law in advance of the necessity of deciding it. * * *"

Second, the Court will not anticipate or presume an unlawful application of a statute. In *Mountain Timber Company* v. *State of Washington*, 243 U. S. 219, 246 (1917), this Court phrased the basic rule of judicial restraint as follows:

> "* * * we will not assume in advance that a construction [of a state statute] will be adopted such as to bring the law into conflict with the Federal Constitution."

a proposition reaffirmed in *Wilshire Oil Co.* v. *United States*, 295 U. S. 100 (1935); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324 (1936); *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 746 (1942); *Toomer* v. *Witsell*, 334 U. S. 385 (1948), and many others.

Third, the Court will always select the constitutionally valid interpretation of the questioned statute if any exists;

"It is a firm rule of constitutional interpretation in this Court that a statute will be held invalid only when no possible application would be lawful" (*Ex Parte Mitsuye Endo*, 323 U. S. 283, 299 (1944)). As said in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 351 (1937), "We apply the familiar canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy [constitutionality]"; also, *Crowell* v. *Benson*, 285 U. S. 22, 46, 62 (1932); *Grenada County* v. *Brown*, 112 U. S. 261, 269 (1884); *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U. S. 270, 274 (1940); *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104, 115 (1939); *Stephenson* v. *Binford*, 287 U. S. 251, 277 (1932).

The basic issue in this case is whether the schools in Prince Edward County can remain closed while other schools in the State of Virginia remain open. With that issue this brief is not concerned. The involvement of the Scholarship Aid program of the State of Virginia is, at most, collateral to that substantive issue. The District Court in its opinion enjoined the payment of scholarship funds in Prince Edward County on the ground that "State scholarships are not available to persons residing in counties that have abandoned public schools"; *Allen v. County School Board of Prince Edward County*, 198 F. Supp. 497, 504 (E.D. Va. 1961). As the court itself pointed out, it was dealing solely with "the question of the lawfulness of the payment of state tuition grants to residents of Prince Edward County during the time public schools are closed" (*id.*, 503). In other words, the District Court did not pass on or consider that it had before it the question of the constitutional validity of the State Tuition Grant Law as such or its application outside Prince Edward County.

This absence of any constitutional question regarding the State scholarship laws was reiterated by the Court of Appeals (322 F. 2d 332, 339-340):

> "As indicated above, Virginia's tuition grants had a considerable history. *That program has not been attacked in this case. Its constitutionality has not been questioned.*
>
> * * * * *
>
> "* * * the basic program of tuition grants, however, its antecedents and its operation and effect were not examined by the court below." (Emphasis added.)

Moreover, the question of scholarship aid arose only on the limited question of whether the defendants in the trial court, the respondents here, had schemed to use these State funds in order to circumvent the court's order of April 22, 1960 (198 F. Supp. 497, 498). The Court was considering not the validity of the law itself, but the collateral question of the defendant's special use of it in Prince Edward County—not as to its general effect on the schools, but only the extent to which such a use affected the existing court order.

Clearly, therefore, the underlying constitutional validity of the Scholarship Aid program in the State of Virginia is not a matter which has been placed in issue in either of the courts below or by any of the facts of record. If it can be said that the statutes are involved at all, the maximum issue on the present record would be the effect of such payments on a particular court order when the same county officials had closed the county schools. There is no basis in the law for generalizing in broad constitutional terms from such a limited situation, particularly in the

light of the further finding of the Court of Appeals (322 F. 2d 332, 340):

> "Elsewhere, apparently, [the tuition grant program] has not been utilized to circumvent the segregation [sic] of public schools."

There Is No Evidence in the Record on Which a General Assertion of Unconstitutionality Could Be Based

Apart from any lack of consideration by the courts below of the broad question which these petitioners now raise for the first time, there seems to us to be little factual basis on which to predicate a judgment even as to the effects of the program in Prince Edward County. On the record, payment was made in 1960-61 but no grants were paid before or since. No such grants were paid in 1959-1960 (R. 185) and the District Court on August 25, 1961 (198 F. Supp. 497) prohibited further payment on the ground that the law itself was not applicable in a county where the public schools were closed. Accordingly, whatever effect the payment of tuition grant funds might suppositiously have had in encouraging the development or continuation of private segregated schools in Prince Edward County, the fact is that with the single exception of the school year mentioned, they were not so paid, and substantially all substitute education in the County was financed by private contribution. Accordingly, not only can we say that the validity of the State Scholarship Aid program was not legally an issue on this record, we can equally say that there seems to be scant factual basis in the record upon which either its efficacy or its effect can be judged.

Apart from any paucity of evidence of the effect of the tuition law in Prince Edward, there is a complete absence

of any proof in the record as to its effects elsewhere in the State. All of the data set out above indicates that there is no substantial relation between the Scholarship Aid program and the progress of school desegregation.

First, it does not seem that it could have any effect. If only 1% of the eligible children of the State are recipients of scholarship aid this is clearly *de minimis*—especially at a time when up to 10% integration is referred to as "*de facto*" segregation. Therefore, even if we were to assume that all of such students were intending to use scholarship aid to attend segregated schools, there would be no noticeable effect on the progress of desegregation in the State. Actually, as the listing of schools, *supra*, p. 9, shows, many of the grant recipients have used the funds not to go to segregated schools but to attend integrated schools both in Virginia and in other states.

And a most important point has been overlooked in this regard. The State Tuition Grant program permits any child living in an area where the schools may still be separate or insufficiently integrated to suit his own educational desires, to take State scholarship aid and attend a racially mixed public or private school of his own choosing without any of the expense or delay which a desegregation suit might involve. During the current school year, there are 58 tuition grant recipients who have come from outside the Charlottesville School District in order to attend two well-known Charlottesville schools which have been integrated for some years past—Lane High School and Venable Elementary School. Similarly, of the 331 negroes receiving scholarship aid during the current school year, many are using the money to attend integrated schools.

We have just shown that the State Scholarship Aid program has no necessary or even probable effect in discouraging further school integration in the State taken as a whole. This is equally true of specific localities. Even if we hypothesize a disproportionate number of applications for tuition grants in an area where a school desegregation suit is pending, the scholarship aid statutes are not of themselves a meaningful factor in the outcome. The District Court in the present case has shown that any federal court in protection of its own jurisdiction could require the withholding of such benefits in the area concerned under its injunctive powers. Since the extent to which the law will be applied in the school district concerned is therefore wholly within the control of the local court, the question of the statute's over-all validity would not and could not arise.

Finally, the fact that a statute may be misused is not of significance. As the cited precedents show, the mere possibility of misuse cannot be a basis for a finding of unconstitutionality. Tax and licensing statutes, police and welfare statutes, and many others could be equally misapplied in a hypothetical situation to initiate or continue an unlawful separation between the races. It is the misuse, not the statute itself, which the law corrects.

II

There Is No Constitutionally Significant Relation Between the State and the Schools Selected by Grant Recipients

It is established that a state may not forbid the education of its children at private schools, *Pierce* v. *Society of The Sisters, etc.*, 268 U. S. 510, (1925), nor limit their

freedom to dissent even in the public schools, *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 627 (1943). The State may constitutionally pay educational expenses incurred for attendance of its children at private schools, *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370 (1930); *Everson* v. *Board of Education of Ewing Tp.*, 330 U. S. 1, (1947), and the granting of such aid is a grant to the child and does not therefore constitute spending of state funds for the support of the school. As stated in *Cochran* (pp. 374-5):

> "'One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.'
>
> * * * * *
>
> "Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private

> concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

The Scholarship Aid program of Virginia is even further from the concept of state action with relation to the schools concerned than were the textbook and bus situations described in *Cochran* and *Everson*—in both of which the State was in necessary contact with the schools concerned. In Virginia, to the contrary, payment is not made to or for the schools but goes directly to the parents or guardian of the applicant and only upon a showing that the child has been enrolled in and has attended a qualified school. (Code of Virginia, 1950, as amended (1962 Cum. Supp.), §§22-115.33 and 22-115.35; Regulations, pp. 2-3; *infra,* pp. A-4, A-5, B-3, B-6). In other words, the school-pupil relation has already been established before the State acts at all. And, as previously noted, the State is forbidden to ever consider eligibility requirements in approving the student's choice (Code of Virginia, 1950, as amended (1962 Cum. Supp.), §22-115.33).

Under these circumstances, there is clearly no "state action" limiting the freedom of choice of any individual or encouraging the attendance at or avoidance of any school. This Court pointed out the distinction between state action and private choice in *Shelley* v. *Kraemer,* 334 U. S. 1, 13 (1948) when it said:

> "Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

This distinction as applied to education is illustrated by the two *Girard College* decisions. In the first, direct state action was found where a state agency denied school admission to the petitioners solely on the basis of color, *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 230 (1957). In the second, the admission policy set by the founder was unchanged, but the state agency no longer had any voice in controlling admissions and had therefore not acted in denying the petitioners' applications, *In re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844 (1958), *app. dism.* and *cert. den.* 357 U. S. 570 (1958). Similarly, *Norris* v. *Mayor and City Council of Baltimore*, 78 F. Supp. 451, 460 (D. Md., 1948); *Dorsey* v. *Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N.E. 2d 541 (1949), *cert. den.* 339 U. S. 981 (1950).

This principle is repeated where the United States rather than a state is the source of the funds concerned as in the "G.I. Bill" for education of veterans (payments made directly to schools, 38 U.S.C., Supp. III §§ 701 *et seq.*) or in the recently proposed tax credits for educational expenditures (S.A. 329, Cong. Rec., 88th Cong., 2d Sess., p. 1697). Both considered the question of avoiding unconstitutional "state action" in the supporting of church schools. It was pointed out by the President's Committee on Education Beyond the High School that the G.I. Bill was not "designed to help, even indirectly, the institutions," and the tax credit plan could also be adopted "without raising the legal issue of 'church-state' relations" (Second Rept. to the President, G.P.O., 1957, pp. 51-2, 96) and in this way was distinguished from cases defining a violation of the "establishment" clause of the First Amendment, *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948); *Zorach* v. *Clauson*, 343 U. S. 306 (1952); *Everson, supra*, p. 20.

Under the Virginia laws here in question, the state has no voice in the selection of a school, no control over its admission policies, no right to distinguish—much less discriminate—in fixing the amount of the substitute payments to be made nor, within reasonable academic limits, any right to delimit the course of study to be pursued. Not only is there no positive action required by the State with respect to any such school, the legislation is such that Virginia is prohibited from so acting. Under these circumstances and the precedents cited, it seems clear that there does not here exist the essential involvement of State direction, or even State ability to deny to any individual a constitutionally guaranteed right.

III

Scholarship Assistance Made Available to All Children on Equal Terms Without Regard to Race, Creed or Color Is Valid as an Expression of the State's Educational Obligation Consistent with First Amendment Freedoms

We have first argued that the constitutionality of the Scholarship Aid program of Virginia is not legally or factually involved in this case or, alternatively, that such a determination is in any event unnecessary to secure the relief that petitioners seek. Second, we have said that such legislation is necessarily not subject to constitutional attack as discriminatory for lack of "state action," as long as the state merely furthers education generally and lacks the choice or even the power to favor the public or the private school or the integrated or separated school or to control or even influence the pupil's free choice in this regard.

Assuming that neither of these points is acceptable to the Court, we come then to the ultimate question, whether it is constitutional for a state to make it possible for its children to choose between an integrated or a segregated school.

If the Virginia Tuition Grant program gave scholarship aid exclusively to children who intended to enroll in separate schools for boys or girls, vocational schools, remedial schools, or other special purpose education, it would be totally unnecessary for the City to file this brief. That a state has a wide choice within the bounds of the doctrine of reasonable classification, to pattern the educational opportunities it offers to its children to their educational necessities seems too patent to require discussion. That a state may carry out this obligation in the form of broadening the optional choices available to each child not only is clearly valid, but is socially commendable. The only basis which the petitioners could possibly have for inveighing against a system of demonstrable educational value is that some of the children involved will elect to attend schools which are not racially integrated.

The issue is not hard to define. All freedoms have positive and negative aspects—freedom to act and freedom from the actions of others. Did this Court hold, in 1954, in *Brown* v. *Board of Education*, 347 U. S. 483, (1954), that the Constitution requires the compulsory congregation of the races in every public school? Or did it hold, more simply, that the constitutional right of those petitioners was to be considered for school admission on a non-racial basis? It is our position that this Court has held, in *Brown* and in *Aaron* v. *Cooper*, 358 U. S. 28, (1958), that the equal protection of the law is a right appertaining to the individual, including his freedom to

associate himself with a group of his own choosing, and that it was indeed his freedom to do so which could not be constitutionally limited by state action.

This dichotomy of affirmative and negative constitutional values was noted by Herbert Wechsler, in giving the Oliver Wendell Holmes Lecture at Harvard Law School in 1959 ("Toward Neutral Principles of Constitutional Law," p. 39):

> "But if the freedom of association is denied by segregation, intergration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension not unlike many others that involve the highest freedoms that Professor Sutherland has recently described. See *The Law and One Man Among Many* (1956), 35 et seq."

The dilemma which Professor Wechsler sees is largely solved by a tuition grant program because it maximizes the freedom of choice of the greatest number of individuals without coercion of, or discrimination against, any. That the association which an individual seeks is not a popular or socially desirable one is all the greater reason why the law should protect his freedom to make it. As the Court said in *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105, 115-6 (1943):

> "Considerable emphasis is placed on the kind of literature which petitioners were distributing—its provocative, abusive, and ill mannered character and the assault which it makes on our established churches and the cherished faiths of many of us.* * * Plainly a community may not supress, or the state tax, the dissemination of views because they are unpopular, annoying or distaseful.* * * That would be a complete repudiation of the philosophy of the Bill of Rights."

Mr. Justice Douglas and Mr. Justice Black, dissenting in *Lerner* v. *Casey*, 357 U. S. 468, 412-13 (1958) phrased it thus;

> "Among the liberties of the citizens that are guaranteed by the Fourteenth Amendment are those contained in the First Amendment.* * * These include the right to believe what one chooses, the right to differ from his neighbor, the right to pick and choose the political philosophy that he likes best, the right to associate with whomever he chooses, the right to join the groups he prefers, the privilege of selecting his own path to salvation."

An earlier great dissenter argued that this right, for the right to be let alone, to enjoy the freedom of personal association. Mr. Justice Brandeis said in *Olmstead* v. *United States*, 277 U. S. 438, 478-9 (1928):

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect * * *. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

See, also, *Board of Education* v. *Barnette*, *supra*, overruling *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940), in which another dissenter, Mr. Chief Justice Stone, had said (*id.*, p. 604):

> "The guarantees of civil liberty are but guarantees of the human mind and spirit and of reasonable freedom and opportunity to express them."

It is this freedom of association, this freedom to assemble with others of like persuasion, which was granted protection by this Court in *National Association for the Advancement of Colored People* v. *State of Alabama,* 357 U. S. 449 (1958), and the related decisions in *NAACP* v. *Button,* 371 U. S. 415 (1963), and *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 539, 546 (1963).

In *Button,* this Court cited as examples of "orderly group activity protected by the First and Fourteenth Amendments" the decision in *Thomas* v. *Collins,* 323 U. S. 516 (1945), involving the efforts of a union official to organize workers, and the associating of various railroads to petition legislation, *Eastern Railroad Presidents' Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127, 137-8 (1961). In *Gibson,* this Court declined to require the production of membership records where this might result in a "substantial abridgement of associational freedom."

In *Bates* v. *City of Little Rock,* 361 U. S. 516, 523, 528 (1960), it was said:

> "And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States."

and Mr. Justice Black concurring, added:

> "One of those rights, freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right. * * * These are principles applicable to all people under our Constitution irrespective of their race, color, politics or religion."

This freedom of association based on personal belief is at the heart of the "concept of neutrality" defined by this Court in the recent school prayer case, *School District of Abington Township, Pennsylvania* v. *Schempp*, 374 U. S. 203, 225-6 (1963).

It is that concept of total neutrality which the State of Virginia has embodied in establishing educational freedom of choice. The State, morally if not legally bound to the providing of an education to the children of its citizens regardless of "their race, color, politics or religion" has, we submit, reasonably accomplished these ends by even handed support of any form of education the individual wants. That 99% of these children continue to attend their local public schools is a source of pride to the State since this now the result of a free choice.

For these reasons, we submit that the scholarship aid legislation of Virginia is clearly non-discriminatory and makes available a freer exercise of the freedoms guaranteed by the First Amendment.

IV

The Petitioners Make No Case for a General Review of the Scholarship Aid Program in Virginia

Petitioners concede that tuition grants are "not unconstitutional per se" (Pet. Br., p. 13). They further concede such statutes are only unlawful to the extent that they are "used to effectuate an illegal or unlawful end" (*ibid.*) Having once accepted this, it is not clear on what basis petitioners then claim general relief going beyond "illegal" application which the record might disclose. Certainly, no one of the authorities cited by peti-

tioners holds invalid a statute "not unconstitutional per se" merely because of a particular misuse.

How, then, do petitioners support their prayer to this Court for a broad assertion of unconstitutionality of all laws involving the use of "public funds * * * for the direct or indirect support of any public or private school which practices racial discrimination" (Pet. Br., p. 3)? It is common knowledge that the organization supporting the petitioners' appeal in this case has publicly asserted that the schools of northern cities are *"de facto"* segregated and that their school boards "practice racial discrimination." Do petitioners here pray a declaration of unconstitutionality of the expenditure of any further funds for the education of children in these public schools of New York, Cleveland, or Boston?

To take a second analogy, it is equally clear that many, if not most, of the private schools of the United States are non-profit educational institutions which receive tax remission and other state benefits such as those discussed in the *Everson* and *Cochran* cases (*supra*, p. 21). Are petitioners here seeking a general declaration of unconstitutionality as to all such laws?

The unlimited scope of petitioners' prayer is, we think, the best argument in favor of the position of the City of Charlottesville in this brief, namely, that whatever use or misuse of any state or local laws may have been made in Prince Edward County, a general extension of that consideration beyond the four corners of the case before the Court opens a Pandora's box whose limits can hardly be explored. If it be true that tuition grants might be used by students to go to a segregated school in Prince Edward County, it is equally clear that many students have taken tuition grants in order to attend integrated

schools in Charlottesville and elsewhere in and out of the State. In fact, at any given time, it could possibly be demonstrated that scholarship aid was principally being used by the recipients as a procedure to increase the degree of integration in the schools of the State.

We suggest that the statement of the issue in the amicus curiae brief of the Government ((Gov. Br., p. 2) more properly limits the issue to:

> "Whether the system of tuition grants and tax credits, as it operates in Prince Edward County, constitutes State support of segregation in education. * * *"

Our agreement with this more limited approach is tempered only by the failure of Government counsel to distinguish between the tax credits and other effects of the ordinances issued by the County Board on July 18, 1960 (R. 108), on the one hand, and the state statutes applying to tuition grants, on the other. About the former, many contentions are made in the briefs of the principal parties; whereas, the language of the latter gives no basis to suggest either support for, or question of, geographical or individual discrimination.

On only one point must we take serious issue with the Government's argument supporting the petitioners' case. In Footnote 34 of the Government brief (page 34), we believe the Government has misread the decision of the Supreme Court of Appeals of Virginia in *Almond* v. *Day*, *supra*. What *Almond* v. *Day* held was that the Virginia State Constitution prohibited the State's paying tuition to any pupil attending *any* private school—not a particular private school, integrated, segregated or otherwise. The decision refers to private schools *as a class*. The distinc-

tion is of major significance. That scholarship aid grants made by the State of Virginia will be used by many of the recipients in *some* private school is unquestionable. It is therefore correct for any court to say that Virginia funds will ultimately benefit some private schools. That such funds must be used or even will be used in any particular school cannot be determined in advance.* As we have pointed out, the State's assistance cannot even be applied for until the school-pupil relationship has previously been established. Neither the *Burton* nor the *Simkins* case cited by the Government (Gov. Br., p. 35) are in point on this. In those cases, the funds were earmarked for and then directly used to create the specific segregated activity complained of. Here, it can hardly be said on either the facts or the legislative history that tuition grants in Virginia are intended to benefit any particular school. This is essentially the point we have made in Part II above.

Our disagreement with the Government on this point is most important. It goes to the very heart of the issue we raise. The complete difference between the State acting affirmatively on the one hand to establish, support, maintain or otherwise assist an unlawful activity—as found in *Burton* and *Simkins*—is the direct opposite of Virginia's Scholarship Aid program which was enacted as a complete abandonment of any further affirmative action by the State in requiring any child to attend any particular school.

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* Limiting the local contribution to local schools in the July 18, 1960, ordinance in Prince Edward County may raise some question under the language of the State statute and regulations.

V

The Special Objections of the Church Schools Have No Basis in the Rulings of this Court

The church school amicus Citizens for Educational Freedom (CEF), argues that the tuition plan must be all or nothing. To support this point they make two basic errors, one of fact, one of law.

CEF first argues, without citation of authority, that the Virginia Scholarship Aid program (CEF Br., p. 9):

> "* * * despite a substantially different outlook, cannot be considered apart from its directly evasive antecedents. However much we might have hoped otherwise, it had its genesis in massive resistance, and this psychology has clearly governed its operation in Prince Edward County."

We are agreed that this legislation has a substantially different outlook (see the quotations from the Perrow Commission's Report, *supra*, pp. 3, 4); and we have avoided making any suggestion as to what "psychology" may have governed its operations in Prince Edward County.

With the balance of the conclusion of the brief writer, however, we most certainly take issue. As with the petitioners, much space has been devoted to the "massive resistance" legislative period in the State of Virginia. Substantially no acknowledgment has been made of the fact that it was not the Federal but the State Courts which invalidated that legislation. No reference has been made in either brief to the report of the Perrow Commission, the Governor's acceptance of their recommendations, or the Legislature's enactment of their proposals. Not

only was massive resistance left behind in the Supreme Court of Appeals of Virginia, but the opposite concept of affirmatively forbidding the State to take any position or to make any distinction on the basis of race or color was adopted as a fundamental policy of the Commonwealth.

That policy is exemplified and carried out in the Scholarship Aid statutes. While it is understandable that CEF should properly oppose a limitation to "non-sectarian" schools, it is not understandable why it should have to do so on the basis of incomplete facts.

As to the familiar legal point which CEF raises, the matter is simply not an issue before this Court. If it were we would only point out that CEF has failed to distinguish between the permissible sectarian supports illustrated by *Cochran* and *Everson, supra,* and the entirely different nature of the participation involved in the *Schempp* case, *supra,* and in *Illinois ex rel. McCollum* v. *Board of Education, supra.*

Conclusion

In 1959 Virginia embarked on a new era in the annals of American education. It became the first American state to adopt what might be called individual freedom of education. Such a freedom is that of association on the part of the child, of thought on the part of his parents. It is a step toward individualism in an age of conformity. The educational possibilities now available to the citizens of the City of Charlottesville are many times greater than they were before 1959. In retrospect and in prospect, the principle of open educational option seems to have much

to commend it. It is non-discriminatory and involves no form of state compulsion or direction. If its validity is considered to be at issue in this case, then we ask the Court to sustain it.

Respectfully submitted,

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Appendix A

Code of Virginia, 1950, as amended (1962 Cum. Supp.)

CHAPTER 7.3.

Grants for Educational Purposes

Article 1.

State and Local Scholarships for Education of Children.

Sec.

Article 2.

Local Educational Grants.

Article 1.

State and Local Scholarships for Education of Children.

§ 22-115.29. Policy of Commonwealth; findings.—The General Assembly, mindful of the need for a literate and informed citizenry, and being desirous of advancing the cause of education generally, hereby declares that it is the policy of this Commonwealth to encourage the education of all of the children of Virginia. In furtherance of this objective, and to afford each individual freedom in choosing public or private schooling, the General Assembly finds that it is desirable and in the public interest that scholarships should be provided from the public funds of the State for the education of the children in nonsectarian private schools in or outside, and in public schools located outside, the locality where the children reside; and that counties, cities and towns, if the town be a separate school district approved for operation, should be authorized to levy taxes and appropriate public funds to provide for such scholarships. (1960, c. 448.)

§ 22-115.30. What children eligible and entitled to State scholarships; amounts.—Every child in this Commonwealth between the ages of six and twenty who has not finished or graduated from high school, and who desires to attend a nonsectarian private school located in or outside, or a public school located outside, the locality in which such child resides shall be eligible and entitled to receive a State scholarship in the amount of one hundred and twenty-five dollars per school year, if attending an elementary school and one hundred fifty dollars if attending a high school. (1960, c. 448.)

§ 22-115.31. Appropriation by local governing bodies authorized.—The governing body of each county, city or town, if the town be a separate school district approved for operation, is authorized to appropriate funds to provide local scholarships in such amount as they may deem proper, not less than the amount specified in this article, for the education of children residing therein, in nonsectarian private schools located in or outside, and in public schools located outside, such county, city or town. (1960, c. 448.)

§ 22-115.32. What children eligible and entitled to local scholarships; amounts.—Every child between the ages of six and twenty, residing in any county, city, or town which provides for the payment of local scholarships under the provisions of this article, who has not finished or graduated from high school, and who desires to attend a nonsectarian private school located in or outside, or a public school located outside, such county, city, or town, shall be eligible and entitled to receive such local scholarship. The amount of the scholarship, if provided, shall be at least that amount which, with the addition of the State scholarship of one hundred and twenty-five dollars or one hundred and fifty dollars as provided by § 22-115.30 of this article, would equal two hundred and fifty dollars if the child attends an elementary school, or two hundred seventy-five dollars if the child attends a high school, or the amount equal to the actual cost of tuition at the school attended by such child, or the total cost of operation, excluding debt service and capital outlay, per pupil in average daily attendance in the public schools of the county, city, or town providing such scholarships, as

determined by the Superintendent of Public Instruction for the school year in which public schools were last operated in such locality, whichever of such three sums is the lowest. (1960, c. 448.)

§ 22-115.33. Rules and regulations of State Board of Education.—The State Board of Education is hereby authorized and directed to promulgate rules and regulations for the payment of such scholarships, and the administration of this article generally. Such rules and regulations may prescribe the minimum academic standards that shall be met by any nonsectarian private school attended by a child to entitle such child to a scholarship, but shall not deal in any way with the requirements of such school concerning the eligibility of pupils who may be admitted thereto. The State Board of Education may also provide for the payment of such scholarships in installments, and for their proration in the case of children attending school less than a full school year. (1960, c. 448.)

§ 22-115.34. Payment of local scholarships where local governing body fails to provide therefor.—If the governing body of a county, city, or town authorized by § 22-115.31 of this article to provide local scholarships fails to provide such scholarships for those entitled thereto, the State Board of Education shall authorize and direct the Superintendent of Public Instruction, under rules and regulations of the State Board of Education, to provide for the payment of such scholarships on behalf of such county, city, or town to the extent hereinafter mentioned. In such event the Superintendent of Public Instruction shall, at the end of each month, file with the State Comptroller and with the governing body and school board of such county, city, or town a statement showing

all disbursements so made on behalf of such county, city, or town, and the Comptroller shall, from time to time, as such funds become available, deduct from other State funds appropriated for distribution to such county, city or town the amount required to reimburse the State for expenditures incurred under the provisions of this section, provided that in no event shall any funds to which such county, city, or town may be entitled under the provisions of Title 63 of the Code or for the operation of public schools be withheld under the provisions of this section. (1960, c. 448.)

§ 22-115.35. Wrongfully obtaining or expending scholarship funds.—It shall be unlawful for any person to obtain, seek to obtain, expend, or seek to expend, any scholarship funds for any purpose other than in payment of or reimbursement for the tuition costs for the attendance of his child or ward at a nonsectarian private school in or outside the county, city, or town making such scholarship grant, or a public school located outside such county, city, or town. A violation of this section shall except for offenses punishable under § 18.1-273 of the Code, constitute a misdemeanor and be punished as provided by law. (1960, c. 448.)

Article 2.

Local Educational Grants.

§ 22-115.36. Authority of counties, cities and towns to appropriate and expend funds for educational purposes.—Notwithstanding any provision of law limiting the power of counties, cities or towns to levy taxes and to appropri-

ate funds for educational purposes, and in addition to the powers granted such counties, cities or towns under other provisions of law, to levy taxes and appropriate funds for educational purposes, the governing body of any county, city or town is hereby authorized and empowered to appropriate and expend funds of the county, city or town for educational purposes in furtherance of the elementary and secondary education of children between the ages of six and twenty years residing in such county, city or town, under such uniform regulations, in such amounts, and to such persons, associations or corporations as the governing body of such county, city or town may, by ordinance, provide. (1960, c. 461.)

§ 22-115.37. **Limitation of powers conferred.**—No other statute heretofore or hereafter enacted by the General Assembly shall be construed to limit the powers thus conferred, except and unless said statute expressly refers to this article. (1960, c. 461.)

Appendix B

REGULATIONS OF THE STATE BOARD OF EDUCATION

Governing

PUPIL SCHOLARSHIPS

(Adopted June 28, 1963)

In accordance with provisions, Act of Assembly, 1960 Session, the following regulations are hereby adopted, for the 1963-64 fiscal year.

The regulations are applicable in all counties, cities, and towns operating as separate school districts and jointly owned and operated schools in Virginia.

Availability of Pupil Scholarships

Scholarships will be available for pupils of legal school age who are eligible to attend the public schools in the county, city or town in which the parent, guardian or such other person standing in loco parentis is a bona fide resident. (Pupils reaching their 20th birthday during the school term may receive pupil scholarship aid for the remainder of the term for which such aid has been approved, assuming all other eligibility requirements are met.)

Pupil Scholarships can be approved for use in:

1. A public school in a county, city or town other than the county, city or town in which the pupil resides, within the confines of the United States.

2. Non-sectarian private schools within the confines of the United States.

3. Schools referred to in Items 1 and 2 above when meeting minimum requirements prescribed hereinafter by the State Board of Education.

Pupil Scholarships cannot be approved for use:

1. In sectarian schools.

2. In kindergarten or any grade classifications not recognized in the normal eleven year or twelve year system in Virginia schools.

3. In commercial business schools.

4. In colleges or technical schools.

5. For home study courses, correspondence courses, extension classes, or summer schools.

6. For pupils whose tuition has been paid by local school boards which have entered into an agreement for the exchange and/or transfer of such pupils on a contractual tuition basis.

7. For the school year during which a pupil is suspended or expelled.

Amount of Pupil Scholarships

The total amount of each scholarship shall be:

1. The actual amount expended by the parent, guardian, or other person standing in loco parentis to such child, for tuition only at a non-sectarian private school, or a public school in a locality other than the locality in which the child would normally attend,

OR

2. The total cost of operation (not including capital outlay and debt services) per pupil in average daily

attendance in the public schools for the locality making such grant as determined for the fiscal year immediately preceding the year in which the scholarship is paid,

OR

3. $250.00 for pupil attending elementary school; $275.00 for pupil attending high school,

Whichever of such three sums is the lowest.

Payment of Scholarships

Except when the State Board of Education is acting under Section 22-115.34 of the Statutes, scholarship applications will be processed by local school boards and payment made in two equal installments for the school year on the basis of the submission of properly executed forms, which forms are described elsewhere in these regulations. Proration of payment shall be made for less than a full term.

The first installment shall be payable as soon as practicable in the discretion of local school board after the submission of satisfactory evidence of enrollment and attendance in a private non-sectarian school, or in a public school in a locality other than the locality in which the child would normally attend; the second to be payable at the end of the fifth month of the school term for which the scholarship has been approved, or any time during the second term in the discretion of the local school board.

On the basis of an approved application, the school board shall authorize payment for the amount of the approved applications for scholarship aid at such times as are stated above. These checks so issued shall be made payable to the parent, guardian, or other person standing

in loco parentis, and delivered to such person. **Such pupil scholarships should not be paid from public school funds.**

In the event local funds are not provided for the payment of the locality's share of such pupil scholarship, the local school board will receive and process applications; such applications will then be forwarded to the State Board of Education for payment as provided by Section 22-115.34 Acts of Assembly, 1960 Session.

Eligibility of Pupil Scholarship Recipients

Pupil scholarships shall be payable to the parent, guardian, or other person standing in loco parentis for the attendance of a child or children in a private nonsectarian school, or in a public school in a locality other than the locality in which the child would normally attend, which school shall meet the following minimum requirements:

1. The teacher or teachers can establish eligibility under the State Board of Education's certification regulations, including provisions for Special License.

2. The facilities meet local requirements for health and safety, subject to the provisions of the Acts of Assembly, 1960 Session.

3. Enrollment shall not be less than 20 pupils of legal school age.

4. The duration of the school term shall not be less than 180 teaching days.

5. The length of school day shall not be less than five hours for those pupils for whom scholarship aid is requested, except that a school day of not less than 3 hours may be approved upon request, for the schools for mentally retarded children.

6. (a) The elementary school curriculum shall include the following subjects as a minimum: Spelling, reading, writing, arithmetic, English, geography, health, drawing, civics, history of Virginia and history of the United States.

(b) The high school curriculum shall include the following subjects as a minimum: English (4 years), math. (1 year), history and government (2 years), and science (1 year). Additional elective credits must be offered in order to total 16 units for graduation.

Schools for Mentally Retarded Children

Schools for mentally retarded children shall comply with items one through five (as listed above) of the requirements for all schools and in addition, meet the following minimum standards:

a. Mentally retarded children shall be grouped according to the classifications (1) trainable, and (2) educable. Separate classes shall be maintained for each of these classifications.

b. There shall be one teacher for every ten children identified as trainable and one teacher for every sixteen children identified as educable. (Minimum enrollment for the school shall be twenty pupils.)

c. The classes for trainable children shall provide for: training in self care, including health, safety, and personal grooming; participation in group and family living; development of simple work habits and skills; and vocabulary development for participation in simple conversation.

d. The instructional program for educable shall emphasize the achievement of simplified skills of reading, writing, and arithmetic within the scope of the child's mental capacity; provide training in prevocational skills; and the development of acceptable personal traits and qualities.

The local school board, or the State Board of Education when acting under Section 22-115.34, shall determine when such minimum requirements have been met.

Final Dates for Filing Applications

Applications for the first semester shall be filed not later than November 15 of each school year and applications for the second semester shall be filed not later than March 15 of each school year.

Applications for Pupil Scholarships

Each applicant requesting a pupil scholarship shall execute an affidavit which shall include, but not be limited to, the following information:

1. (a) Name of child

(b) Sex, race and birth date

2. Name and address of parent, guardian, or other person standing in loco parentis

3. Name and address of school last attended and grade

4. Name and address of school in which child, for whom application for scholarship is made, has been accepted

Name of principal, headmaster, or other administrative head

Grade to which pupil has been assigned

Number of actual teaching days such school is scheduled for operation

5. The parent, guardian, or other person standing in loco parentis of such child or children agrees to furnish the Division Superintendent of Schools such information as he may require concerning the attendance of such child or children receiving scholarship aid.

6. The parent, guardian, or other person standing in loco parentis agrees to refund such scholarship payment if the pupil fails to attend school regularly.

7. The parent, guardian, or other person standing in loco parentis shall certify that the scholarship is requested for the sole purpose of paying tuition at a private non-sectarian school, or at a public school in a locality other than the locality in which the child would normally attend, and shall furnish proof of the child's attendance.

8. If scholarships are sought, obtained, and/or expended for any purpose other than those set forth in the statutes, then such parent, guardian, or other person standing in loco parentis shall be punishable by Section 18-237 of the Code of Virginia.

Reimbursement to Local School Boards:

The State Board of Education will reimburse local school boards for the State's share of such scholarship payments as prescribed by statutes. Reimbursement by the State shall be requested on forms prescribed by the Superintendent of Public Instruction. Such reimbursement shall be claimed by Jan. 1, for the first semester and June 1 for the second semester.

APPENDIX C

Form P. S. 2-7-1-63-15M sets

APPLICATION FOR PUPIL SCHOLARSHIP

1963-64

1. Name of child_____

Sex_____ Race_____ Date of Birth_____ Age_____

2. Name of parent or guardian_____

Address_____ Phone_____
City or Town

3. Name and address of school last attended_____

School Year_____ Grade_____ Public ☐ Private ☐

4 Name of school in which applicant for scholarship has been <u>accepted</u> for 1963-64

Address_____
City or Town

Public ☐ Private ☐

Name of principal, headmaster or other administrative head_____

Grade to which applicant has been assigned for 1963-64_____

Total cost of tuition not including room and board for school year or total tuition charge for that portion of the year for which the child is enrolled_____ $_____

Amount of above tuition actually paid as of date of this application_____ $_____

Amount of tuition to be paid_____ $_____

5. If scholarship funds are made available, I agree

(1) to furnish the Division Superintendent of Schools with such information as he may request and/or require concerning the attendance of the child for whom scholarship aid is requested.

(2) to refund such scholarship if the pupil fails to attend regularly.

(3) to notify the school board of any change in my address or that of the pupil for whom scholarship aid is granted.

6. I hereby certify that the scholarship is requested for the sole purpose of paying tuition at a private non-sectarian school, or public school in a locality other than the locality in which the child would normally attend.

7. I have read the above questions and answers, and I understand that if scholarships are sought, obtained, and/or expended for any purpose other than those set forth in the statutes and regulations of the State Board of Education, I shall be punishable as provided by Section 18-237 of the Code of Virginia.

(Original Copy)

(over)

8. I hereby apply for scholarship aid in the amount of $_____ for the 1963-64 school year, or for the period _____ to _____ (if less than a full year).

_____ Date Signed

_____ Signature of Parent, Guardian or other person standing in loco parentis

9.

THE FOLLOWING CERTIFICATE MUST BE EXECUTED BY A NOTARY PUBLIC OR OTHER PERSON AUTHORIZED TO TAKE ACKNOWLEDGMENTS

State of Virginia

County (City) of _____

On this _____ day of _____, 19____

_____ (Name of Parent or Guardian executing this form)

whose name is signed to the foregoing instrument(s), personally appeared before me, acknowledged the foregoing signature to be his, and having been duly sworn by me, made oath that the statements made in the said instrument s are true.

My commission expires _____

_____ Notary Public

10.

To the best of my knowledge the pupil for whom this application is made is eligible for a Pupil Scholarship under the regulations of the State Board of Education and the statutes as they relate to the educational and non-sectarian status of the school involved and to the pupil's age, qualification, residence, and attendance. I, therefore, recommend approval of the application in the amount of $_____ *

_____ Date

_____ Division Superintendent

_____ County or City

*Note: Please explain prorated amount approved.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 592

COCHEYSE J. GRIFFIN, *etc, et al.*,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, *et al.*,
Respondents.

SUPPLEMENTAL MEMORANDUM FOR THE CITY OF CHARLOTTESVILLE AS AMICUS CURIAE

It is stated in the Supplemental Memorandum for the United States (p. 4):

> "These petitioners seem also to have abandoned any broad attack on the Virginia tuition grant statute and to confine themselves—as does the United States—to seeking an injunction against the use of such grants in Prince Edward County. . . ."

The City of Charlottesville, on the basis of the argument before the Court, is of the same opinion, but if it should later appear that petitioners have not abandoned their general attack on the program, we would respectfully ask the Court to consider the following.

It is the thought of the City that the oral argument may

have left with the Court an impression that the present scholarship aid statutes of the State of Virginia are a residual portion of the 1956 "massive resistance" legislative package and had therefore been enacted as part of a plan to maintain segregation in the Virginia schools. As our brief will demonstrate (pp. 2-5) the present tuition grant program is a product of the abandonment in 1959 of the earlier policy of "massive resistance," and its statutory purpose—to whatever extent such intent may be relevant—was to withdraw the State from any further activity in support of segregation in the schools; an intent which we believe is fully exemplified by the operation of the program since its enactment (Br. pp. 6-10).

Respectfully submitted,

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